

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT

CAUSE NO. 49D02-0807-PL-029256

STATE OF INDIANA,

Plaintiff,

v.

BRIAN S. HESSLER, individually
and doing business as
GREAT BUSINESS
OPPORTUNITIES, LLC

Defendant.

FILED

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JAN 02 2009

Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AGAINST THE DEFENDANT**

The Plaintiff, State of Indiana, by Attorney General Steve Carter and Deputy Attorney General Tammy Somers, in accordance with Rule 56 of the Indiana Rules of Trial Procedure files the following Memorandum in Support of the Plaintiff's Motion for Summary Judgment Against the Defendant, Brian S. Hessler, individually and doing business as Great Business Opportunities, LLC.

I. Procedural History

On July 1, 2008, Plaintiff, the State of Indiana, filed its Complaint for Restitution, Costs, and Civil Penalties against the Defendant. The Complaint alleged that the Defendant violated the Indiana Business Opportunity Transactions Act ("BOTA"), Ind. Code § 24-5-8-1, *et seq.* The Defendant filed an Answer, Counterclaim, and Motion to Dismiss on August 6, 2008. On August 18, 2008, the State of Indiana filed an Answer to Defendant's Counterclaim and a Response to Defendant's Motion to Dismiss. Shortly thereafter, the Defendant filed a Motion for Default Judgment, a Request for Telephonic Appearance, and a Motion to "compel full information disclosure". On September 29, 2008 the State of Indiana filed a Motion in Response to Defendant's Motion to Compel. A hearing on the Motion to Dismiss and Default Judgment was set for

September 30, 2008. No Orders were granted or denied at this time other than the Defendant being ordered to obtain appropriate counsel. As of December 22, 2008, the above Motions are still pending before this Court. Trial is currently set for February 20, 2009.

II. Applicable Legal Standards

Summary judgment is appropriate if the designated evidentiary matter shows there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663,665 (Ind. 2006). The purpose of summary judgment is to terminate litigation about which there can be no factual dispute. *Trinity Baptist Church v. Howard*, 869 N.E.2d 1225, 1228 (Ind. Ct. App. 2007). The party moving for Summary Judgment bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *S.E. Johnson Cos., Inc. v. N. Ind. Pub. Serv. Co.*, 852 N.E.2d 1, 5 (Ind. Ct. App. 2006).

Once a movant meets these two requirements, the burden shifts to the non-moving party to set forth specifically designated facts showing the existence of a genuine issue. *Id.* Any doubts as to any facts or inferences to be drawn from are resolved in the light most favorable to the non-moving party. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1282 (Ind. 2006). Furthermore, despite a conflict in facts and inferences on some elements of a claim, Summary Judgment may be proper when no dispute exists with respect to the facts that are dispositive of the litigation. *Ritchhart v. Indianapolis Pub. Sch.*, 812 N.E.2d 189, 192 (Ind. Ct. App. 2004). The non-moving party may not merely rest upon the allegations or denials of his pleadings but must set forth specific facts. *Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005).

III. Designation of Supporting Materials

The Plaintiff, pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, designates the following materials on which it relies for purposes of this motion:

1. The Plaintiff's Complaint for Restitution, Costs, and Civil Penalties, filed in this matter on July 1, 2008 and all Exhibits attached thereto.

2. The Defendant's Answer ("Counterclaim") to the Plaintiff's Complaint filed in this matter on August 6, 2008.

IV. Undisputed Material Facts

Pursuant to Trial Rule 8(D) of the Indiana Rules of Trial Procedure, "Averments in a pleading to which a responsive pleading is required, except those pertaining to amount of damages, are admitted when not denied in the responsive pleading." The following are undisputed material facts:

1. The Defendant, Brian S. Hessler, individually and doing business as Great Business Opportunities, LLC, is engaged in the sale of business opportunities which includes selling travel packages, setting up websites, and providing advertising to consumers from his principle place of business located at 1833 East Baseline Road Suite 180, Gilbert, AZ, 85234.

2. The Defendant, doing business as Great Business Opportunities, LLC, has engaged in the sale of business opportunities to the general public since October 1, 2006; this includes Indiana consumers (Defendant's Counterclaim, Paragraph 1).

3. The Defendant, doing business as Great Business Opportunities, LLC, agrees that these business opportunities consist in the sale of websites, travel packages, and television advertising, among other things (Defendant's Counterclaim, Paragraph(s) 2 & 3).

4. The Defendant has represented to potential investors, through infomercials and similar media, that their investments in a business opportunity (for goods made or services rendered) is in an actual, existing market (Business Opportunity Questionnaire, Exhibit 'D').

5. The Defendant failed to file with the consumer protection division of the Office of the Attorney General a copy of the disclosure statement required by Ind. Code § 24-5-8-2 and a

copy of the bond required by Ind. Code § 24-5-8-3, and to pay the initial filing fee of Fifty Dollars (\$50.00) prior to advertising or making any other representations to any investor in Indiana, as required by Ind. Code § 24-5-8-4. (Plaintiff's Complaint, Paragraph(s) 16, 17, & 18, Not Denied in Defendant's Counterclaim).

Facts regarding Rick Hayworth

6. Between November 6, 2006 and December 22, 2006, Rick Hayworth of Fowler, Indiana contracted with the Defendant to purchase a travel website, a "level II" travel package, and television advertising, for an initial cash payment of Five Thousand One Hundred and Forty-Nine Dollars (\$5,149.00). (Plaintiff's Complaint, Paragraph 5, Defendant's Counterclaim, Paragraph(s) 2 & 3).

7. The "contract" between the Defendant and Hayworth consisted of three invoices; the first for One Hundred and Forty-Nine Dollars (\$149.00) (Plaintiff's Complaint, Paragraph 7, Defendant's Counterclaim, Paragraph 2), the second for Two Thousand and Five Hundred Dollars (\$2,500.00) (Plaintiff's Complaint, Paragraph 9, Defendant's Counterclaim, Paragraph 3), and the third for Two Thousand and Five Hundred Dollars (\$2,500.00) (Plaintiff's Complaint, Paragraph 11, Defendant's Counterclaim, Paragraph 3).

8. The Defendant's contract (each invoice, separately read but treated together) with Hayworth failed to include the following information, as required by Ind. Code § 24-5-8-6:

- a. the name and business address of Defendant's agent in Indiana authorized to receive service of process;
- b. a detailed description of any services that the Defendant undertakes to perform for the investor;
- c. a detailed description of any training that Defendant undertakes to provide to the investor;

d. the approximate delivery date of any goods Defendant is to deliver to the investor; and

e. a statement of the investor's thirty (30) day right to cancel the contract.

(Plaintiff's Complaint, Paragraph(s) 7, 9, & 11, Exhibit(s) 'A', 'B', & 'C')

9. The Defendant did not provide Hayworth with a copy of a disclosure document containing the information required by Ind. Code 24-5-8-2. (Plaintiff's Complaint, Paragraph 16, Not Denied in Defendant's Counterclaim).

10. The Defendant did not obtain a surety bond in favor of the State of Indiana for the use and benefit of investors, as required by Ind. Code § 24-5-8-3, prior to its transaction with Hayworth. (Plaintiff's Complaint, Paragraph 17, Not Denied in Defendant's Counterclaim).

11. The Defendant required Hayworth to make initial cash payments exceeding twenty percent (20%) of the initial payment, as referred to in paragraph 6, contrary to Ind. Code § 24-5-8-11 (Plaintiff's Complaint, Paragraph 20, Not Denied in Defendant's Counterclaim).

12. After making a minimal return on his investment (Five Hundred Dollars (\$500.00) over the course of six months), Mr. Hayworth filed a complaint with the Indiana Attorney General's Office, Consumer Protection Division, on June 22, 2007 against the Defendant (Plaintiff's Complaint, Paragraph 13, Implicitly Admitted in Defendant's Counterclaim, Paragraph(s) 5-6).

13. The Defendant responded to this consumer complaint by filling out the aforementioned questionnaire (wherein admitting he was in the business of selling business opportunities to potential investors) and denying Mr. Hayworth desire to cancel the contract and receive a refund (Plaintiff's Complaint, Paragraph 14, Defendant's Counterclaim, Paragraph(s) 5-6, Caption: Response to Plaintiff's Alleged Violations, Subsection (b)).

V. **The Defendant, Brian S. Hessler, individually and doing business as Great Business Opportunities, LLC, violated the Indiana Business Opportunity Transactions Act.**

Indiana law applies to these transactions

The Defendant is a “seller” as defined by Ind. Code § 24-5-8-1. Mr. Hayworth is an “investor” as defined by Ind. Code 24-5-8-1. An “investor” is defined as “a person who is solicited to become obligated or does become obligated on a contract”. The transactions referred to in paragraphs 6 and 7 are “business opportunities” in that they:

1. Involved the sale or lease of goods or services to an investor that are to be used by the investor in beginning or operating a business;
2. involved an initial payment by the investor of more than five hundred dollars and an initial cash payment of less than fifty thousand dollars; and
3. involved a solicitation of investors in which the seller represents that:
 - i. a market exists for any goods to be made or services to be rendered by the investor.

It is undisputed that the Defendant was offering goods and services to investors to begin and operate a travel website, and that the investor, Rick Hayworth, made initial payments of more than five hundred dollars, and initial cash payments of less than fifty thousand dollars. In any business opportunity, it is implied that a market exists for the investor’s products, as well as that the investor will earn an amount in excess of the initial payments as a result of the investment. Even without this implication, the Defendant does not deny or refute, rather admits, that he represented to Mr. Hayworth that there existed a market for Hayworth to earn capital from his investment for a travel business. (*See* State’s Complaint State’s Exhibit D, 3(b)).

In addition, there is no requirement that the investor be originally solicited by the seller, contrary to the assertion of the Defendant, for Indiana law to apply (*See* Defendant’s Counterclaim, Caption: Response to Plaintiff’s Alleged Violations). Rather, the statute defines, in relevant part,

investor as a person “who is solicited to become obligated *or does* become obligated on a contract.” Ind. Code. § 24-5-8-1 (emphasis added). Defendant not only admits that he was in a contract with Mr. Hayworth for the sale of a business opportunity, but does so as a “binding” reason not to refund Mr. Hayworth his investment. Furthermore, the legislature listed several exceptions to BOTAs in Ind. Code. § 24-5-8-1; to which none apply to the Defendant’s affirmative defense that Indiana law does not apply. If the statute allowed an otherwise obvious business opportunity to evade the requirements of BOTAs, simply if the seller were originally contacted by the investor, Indiana would become a safe-haven for a litany of BOTAs-violations and fraudulent activity. That is, by requiring a showing of who contacted who, when, as an additional element of proof for BOTAs to apply would render Summary Judgment a non-existent tool lacking both bark and bite.

Defendant failed to comply with the requirements of BOTAs.

By his own admission, the Defendant failed to comply with all the requirements of BOTAs (See Defendant’s Counterclaim). As established, the transaction described in Paragraph 6 is a sale of a “business opportunity” as defined by Ind. Code §24-5-8-1, and thus subject to the requirements of BOTAs.

The Defendant’s failure to file with the Consumer Protection Division of the Office of the Attorney General a copy of the disclosure statement and surety bond and pay the initial filing fee of Fifty Dollars (\$50.00) prior to placing any advertisement or making any representation to any Indiana investor about its business opportunity, as referenced in paragraph 5 above, violates Ind. Code § 24-5-8-4. Defendant’s failure to obtain a surety bond in favor of the State of Indiana, as referred to in paragraphs 5 and 10 above, violates Ind. Code § 24-5-8-3.

The Defendant’s failure to provide Mr. Hayworth with the disclosures required by Indiana law at least seventy-two (72) hours before the earlier of the investors’ execution of a business opportunity contract with the Defendant or receipt of any consideration by the Defendant, as

referred to paragraph 9 above, violates Ind. Code § 24-5-8-2. The Defendant's failure to include in its contracts the information referenced in paragraph 8 above violates Ind. Code § 24-5-8-6(b).

Lastly, the Defendant's act of requiring Mr. Hayworth to make initial cash payments exceeding twenty percent (20%) of the initial payments, as referred to in paragraphs 6 and 11 above, violates Ind. Code § 24-5-8-11 in that those payments exceeded twenty percent (20%) of the initial payment and the funds in excess of the twenty percent (20%) amount were not placed in an escrow account in accordance with Ind. Code § 24-5-8-12.

VI. Remedies

Pursuant to Ind. Code § 24-5-8-20, any violation of BOTTA is a deceptive act actionable by the attorney general under the Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1 *et. seq.*, and subject to its remedies and penalties.

Restitution

Under Ind. Code § 24-5-0.5-4(c), the court may order the seller to make payment of the money unlawfully received from aggrieved consumers to be held in escrow for distribution to aggrieved consumers. Here, Hayworth is entitled to a full return of his investment, minus his return of Five Hundred Dollars (\$500.00), totaling Four Thousand Six Hundred and Forty-Nine Dollars (\$4,649.00).

Civil Penalties

Under Ind. Code § 24-5-0.5-4(d), the court may void or limit the application of contracts or clauses resulting from deceptive acts and order restitution to be paid to aggrieved consumers. The Plaintiff is asking the Court to find that the contract entered into between Mr. Hayworth and the defendant is void and therefore cancelled due to the defendant's deceptive acts.

Under Ind. Code § 24-5-0.5-4(g), if a person knowingly violates the Deceptive Consumer Sales Act, then the Attorney General, in an action pursuant to Ind. Code § 24-5-0.5-4(c), may

recover from the person a civil penalty of a fine not exceeding Five Thousand Dollars (\$5,000.00) per violation.

In this case, the Defendant committed five (5) separate violations, including failing to register with the consumer protection division, failing to procure the proper surety bond, failure to provide disclosure documents to Mr. Hayworth, failure to provide a completed contract to Mr. Hayworth, and requiring Mr. Hayworth to make initial cash payments of more than 20%.

In accordance with Ind. Code § 24-5-0.5-4(g), the Plaintiff requests the Court assess a civil penalty of Five Thousand Dollars (\$5,000.00) for each of the Defendant's five (5) violations of the Deceptive Consumer Sales Act, which would total Twenty-Five Thousand Dollars (\$25,000.00). The Plaintiff requests this Court assess a total civil penalty of Twenty-Five Thousand Dollars (\$25,000.00) for the Defendant's violations of the law.

Injunctive Relief

Under Indiana Code § 24-5-0.5-4(c)(1), the court may issue an injunction if the Deceptive Consumer Sales Act is violated. Pursuant to the Deceptive Consumer Sales Act, the Plaintiff requests the Defendant, its agents, representatives, employees, successors or assignees be enjoined from engaging in conduct in violation of Ind. Code 24-5-8-1 *et seq.*, including, but not limited to, engaging in the solicitation and sale of business opportunities without having previously registering as a seller of business opportunities as required by BOTA.

Costs of Investigation and Prosecution of this Action

Finally, Ind. Code § 24-5-0.5-4(c)(3) allows for a court to "order the supplier to pay the State the reasonable costs of the attorney general's investigation and prosecution." The Attorney General's office has spent at least Twelve and Two-Tenths Hours on the investigation and prosecution of this matter. Therefore the Defendant should be required to pay the state for the reasonable cost of investigating and prosecuting this case. Pursuant to the Affidavit of Deputy

Attorney General Amber Degenhart, a reasonable attorney fee for the work she performed during the investigation and prosecution of this action is One Hundred Dollars (\$100.00) per hour. A reasonable attorney fee for the work Deputy Attorney General Tammy Somers performed during the investigation and prosecution of this action is One Hundred Dollars (\$100.00) per hour. The Plaintiff has thus incurred total costs of One Thousand Two Hundred Twenty Dollars (\$1,220.00). (Somers Affidavit, Paragraphs 3 and 4).

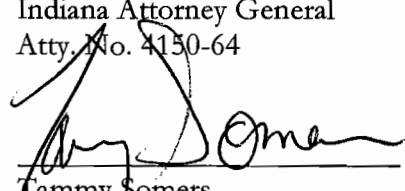
VII. Conclusion

The designated materials show undisputed material facts supporting a finding that the Defendant, Brian S. Hessler, individually and doing business as Great Business Opportunities, LLC, knowingly and intentionally violated the Indiana Business Opportunity Transactions Act, thereby subjecting itself to the remedies and penalties set forth in the Indiana Deceptive Consumer Sales Act. Therefore, the State of Indiana respectfully requests this Court grant its motion for Summary Judgment and enter an order to cancel the contract, for injunctive relief, restitution, costs, civil penalties, totaling Thirty Thousand, Eighty-Nine Dollars (\$30,869.00), and for all other just and proper relief against the Defendant.

Respectfully submitted,

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By:


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